No. 283

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IN THE

Supreme Court of the United States

October Term, 1952 No.

MORRIS GORDON,

Petitioner,

vs.

MIRIAM GORDON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Morris Gordon, the petitioner herein, prays that a writ of certorari be issued to review the final decree of the Supreme Court of the State of Florida affirming the decree of the Circuit Court of Dade County, Florida, granting a divorce to the respondent herein.

SUMMARY STATEMENT OF THE FACTS

This petition relates to a writ of certiorari to review the decree of the Supreme Court of Florida filed on May 2, 1952.

This case had previously been considered by the Supreme Court of Florida. There is no substantial dispute as to the facts, but only as to the conclusions of law resulting therefrom. The case involves the question as to whether or not the Florida Courts accorded to a final judgment of a Pennsylvania Court the full faith and credit guaranteed that Pennsylvania judgment by the Constitution of the United States.

An important reason for the grant of a writ of certiorari to review a case decided by a State Court is a lack of uniformity in State Courts regarding the full faith and credit to be accorded the final decree of a State Court by the Courts of sister states. That there is a lack of uniformity in state courts regarding the questions presented in this case is clearly shown by that portion of the opinion of the Supreme Court of Florida, quoted at page 19 of this petition, under the reasons for granting a writ in this case.

The following facts (except those in parenthesis) are shown in the opinion on the first appeal in this case as reported in 4 A.L.R. 2d at page 104. Respondent instituted an action for divorce in Pennsylvania on the ground of indignities to her person. Petitioner appeared and filed an answer. While the case was pending, the respondent went to Florida and there instituted a suit for divorce, charging petitioner with extreme cruelty and desertion. A special master was appointed in the Florida case and testimony was taken. Subsequently, respondent moved in the Pennsylvania suit for leave to discontinue that case. The Pennsylvania Court refused to permit her to discontinue it. Upon the petitioner's motion, the Pennsylvania Court appointed a Master who proceeded to take testimony. At the hearing in Pennsylvania, the respondent did not appear nor was she represented by Counsel, although she had notice of the hearing and had ample opportunity to attend and offer testimony. After taking testimony the Master in the Pennsylvania case recommended that respondent's

Pennsylvania action be dismissed because the charges were unproved. The petitioner offered voluminous testimony. (Among other things, the master in the Pennsylvania case found that the respondent was not domiciled in Florida, but that she was a resident of Pennsylvania at the time of the hearing, which was many months after she had filed her action in Florida. (R 222-218). The parties were residents of Pennsylvania at the time of the marriage; they were married in Pennsylvania; and they lived in Pennsylvania until the respondent refused to live with her husband and separated from him. (R 134). The respondent claimed in the Florida action that she left her husband because of his treatment of her.) The petitioner offered evidence and testified regarding his conduct, in the Pennsylvania Court hearing, and the Pennsylvania Court held by final judgment that the conduct of the petitioner did not warrant a decree on the ground of indignities to the person.

The petitioner had filed an answer in the Florida case and that case came to hearing about the same time as the Pennsylvania case. The special master recommended a divorce on the ground of extreme cruelty, but held that the testimony failed to prove desertion. After the Pennsylvania action had been dismissed by the final judgment of the Pennsylvania Court, the petitioner moved to dismiss the Florida suit claiming that the dismissal of the Pennsylvania action operated as res judicata and was therefore entitled to full faith and credit in the Florida court. He was permitted to amend his answer to set up the Pennsylvania judgment as a bar to the respondent's action in the Florida Court. Subsequently, the Circuit Court in Florida denied the petitioner's motion to dismiss the respondent's suit there, and struck from the answer the amedment which included the record of the Pennsylvania case and judgment. The circuit Court for Dade County, Florida, then granted the respondent an absolute divorce.

From that decree, the petitioner appealed to the Supreme Court of Florida and that court reversed the cause and remanded the case for further proceedings.

We believe that the questions involved can be presented most clearly by adopting the following statements from the opinion of the Supreme Court of Florida now under review and by stating certain undisputed facts which appear in the transcript of the record on the second appeal to the Supreme Court of Florida. With this purpose in view, we quote from the opinion (R 770): "This is the second appearance of the instant suit in this Court. The citation of our opinion on the prior appeal is 160 Fla. 838, 36 So. 2d 774, 4 A.L.R. 2d 102. On the former appeal we reversed the decree of divorce which was entered in favor of Miriam Gordon." * * * * *

The Court continues (R 772): "It was our opinion and judgment upon the first appearance of the instant suit in this Court that the Pennsylvania Court's final decree should have been given full faith and credit because we determined that both suits were predicated upon the same cause of action after concluding that the testimony which was presented by the appellee in her Florida suit was "essentially the same as that which she would have been required to present to establish her charge of 'indignities to the person', had she pursued her action in Pennsylvania where she was given ample notice and opportunity to be heard.

Upon remand to the Circuit Court appellee amended her bill of complaint. In and by her amendment she reiterated her charge of extreme cruelty and elaborated thereon. She also reasserted that the appellant had been guilty of desertion which she contends was constructive in character.

The final decree from which this appeal is prosecuted granted unto Miriam Gordon a decree of divorce a vinculo matrimonii. In and by said decree it was determined Miriam Gordon had established that her husband was guilty

of desertion and of extreme cruelty which was expressly declared to have been of a physical nature.

It was the Chancellor's view that full faith and credit need not now be given to the final decree of the Pennsylvania court. It was his opinion that the evidence which was produced by the appellee established extreme cruelty of a physical nature and that her action in Pennsylvania was not based upon a ground which contemplated physical cruelty. He further reached the conclusion that appellee's suit in this State was not foreclosed by the final decree of the Pennsylvania court because appellee did not in that court assert desertion as a ground for divorce. Moreover the Chancellor followed the suggestion of counsel to the effect that she could not have charged desertion at the time she filed her action in Pennsylvania under the law of that State because the Pennsylvania statute required desertion for a period of two years and such period had not then run." • • •

The Court then considered the testimony in the case and first disposed of the question involved in the grant of a divorce to the wife on the ground of extreme cruelty, making the following statement (R 780): "It may be that appellee's evidence made a prima facie case for a final decree of divorce upon the ground of extreme cruelty but the character of such cruelty must be classified as mental. However, it is improper for us to decide whether such evidence could be said to establish extreme cruelty of a mental character sufficient to justify a final decree of divorce because we are compelled again to hold that full faith and credit should have been given to the final decree of the Pennsylvania court, insofar as the cause of action in the instant suit was founded upon extreme cruelty, and that court decided said question adverse to appellee. The relief sought by appellee upon the ground ofextreme cruelty should have been denied because the allegations of the amended bill and the proof in support thereof failed to establish extreme

cruelty of a physical nature, and extreme cruelty of a mental character was foreclosed by the final decree in the Pennsylvania suit." • • • • •

The Court then considered the effect of the final judgment in the Pennsylvania case and the credit to be given to that final judgment in the Florida Courts insofar as the granting of a divorce on the ground of desertion is concerned. As to that cause for divorce, the Supreme Court of Florida held that the final decree of divorce granted respondent upon the ground of desertion should be affirmed (R 787). The respondent did not contend that petitioner had left her, but on the contrary that petitioneer's course of conduct caused her life with him to be so burdensome as to require her, in the interest of her health and peace of mind, to leave the petitioner. This constitutes what is commonly called "constructive desertion" (R 781).

The petitioner contended that his conduct toward his wife had been conclusively adjudicated by the final decree of the Pennsylvania Court and that the final judgment was res judicata with respect to the petitioner's conduct toward his wife. He contended that the full faith and credit clause of the Federal Constitution demanded that the Florida Courts give full faith and credit to that final decree of the Pennsylvania Court, which thus became a bar to the respondent's claim that the conduct of her husband was such as to justify her in leaving her husband. That action commenced the constructive desertion upon which the divorce decree was affirmed by the Supreme Court of Florida. That Court held that none of the issues presented in this case, insofar as it is predictated upon "constructive" desertion is concerned, was adjudicated in the Pennsylvania action, nor were the issues ones proper to have been adjucitated in the Pennsylvania litigation (R 783). The Court held that respondent could not have charged her husband with desertion in the Pennsylvania action because the desertion

had not existed for two years or more (R 783). The Court stated that the facts relied upon by the respondent in her Pennsylvania suit in which she sought an absolute divorce on the ground of indignities to her person would have been essentially the same had she appeared and testified, as the facts which she presented in the Florida action (R 784). Petitioner contended that since the facts were essentially the same, the final decree of the Pennsylvania Court was res judicata and therefore a bar to the granting of a divorce by the Florida Courts. Notwithstanding that the facts were essentially the same as respondent would have been compelled to prove in the Pennsylvania action, the Supreme Court of Florida held that the final judgment of the Pennsylvania Court did not operate as res adjudicata upon the final decree of divorce granted upon the ground of desertion because the points and questions actually litigated and determined were not the same in both actions (R 787). To arrive at that conclusion, the Florida Court adopted the following reasoning: While it is true that the facts relied upon by respondent in her Pennsylvania suit on the ground of indignities to the person would have been essentially the same as the facts she presented in the Florida action, the degree of proof necessary to entitle her to a final decree of divorce upon the ground of indignities to the person in the Pennsylvania action was greater than the degree of proof required to establish that she was justified in temporarily separating from her husband under the law of the State of Florida, and that therefore, neither estoppel by judgment nor res adjudicata forms a basis for invocation of the full faith and credit clause of the Federal Constitution (R 784).

The final decree of the Supreme Court of Florida granting respondent a divorce upon the ground of desertion is thus based upon the action of the Florida Court in construing the effect of the final judgment of the Pennsylvania Court insofar as the Supreme Court of Florida based its opinion upon the degree of proof required in Pennsylvania,

to entitle a litigant to a final decree of divorce upon the ground of indignities to the person.

The Florida Court had knowledge of the degree of proof required under the laws of the State of Florida to justify a wife in temporarily separating from her husband and thus to begin the period of "constructive" desertion. The Supreme Court of Florida failed to give full faith and credit to the final judgment of the Pennsylvania Court when it attempted to define the degree of proof required in Pennsylvania to entitle a litigant to a final decree of divorce upon the ground of indignities to the person. The law of Pennsylvania was in evidence upon the trial; there was no contradiction of it; and it showed that there is no general rule under the law of Pennsylvania as to the degree of proof required to sustain a decree of divorce upon the ground of indignities to the person. (R456)

The fact that there is no general rule in Pennsylvania regarding the matter is sustained by many decisions of the Superior Court of Pennsylvania, copies of opinions in which were in evidence in this case. The numerous decisions of the Superior Court of Pennsylvania sustain the proposition as stated in the opinion of the Superior Court of Pennsylvania, in the case of BOCK V. BOCK, reported in 162 Pa. Superior Ct. at page 506, from which we quote as follows (R 456): "As stated by Judge Rhodes in Monaco V. Monaco, 160 Pa. Superior Ct. 117, at page 118, 50 A. 2d 520, at page 521: "We have repeatedly said that it is impossible to lay down a general rule for the determination of what indignities render the condition of the injured party intolerable and his life burdensome. Hahn v. Hahn, 135 Pa. Superior Ct. 39, 41, 4 A. 2d 821. The circumstances of each case must largely determine whether the acts charged amount to such indignities as will justify the court in making a decree of divorce. * * * "

Similar statements in other opinions are contained in the record at pages 336, 384, 391, 424, 431, and 465.

In the Florida action petitioner raised the question of residence and domicile of the respondent, denying in his answer that respondent had been a resident of Florida for for more than 90 days prior to the filing of her bill of complaint. He averred on the contrary, that her bona fide legal residence on June 28, 1947, and prior thereto, was in Pennsylvania (R 89). He denied that he was guilty of desertion and everred on the contrary that respondent had deserted him in Pennsylvania (R 105).

The master in the Pennsylvania case had considered the question of residence and domicile and on the basis of the facts presented, found that the respondent was domiciled in Pennsylvania and not domiciled in the State of Florida on May 27, 1947, the date of the hearing in Pennsylvania (R 222, 218). On June 28, 1947, the findings of fact, conclusions of law, and recommendation of the master were adopted by the Pennsylvania Court and the libel was dismissed at her costs (R 230). Respondent had filed her action in the Florida case on September 30, 1946 (R 8).

The respondent voluntarily selected the Pennsylvania Court as the Court to try her action for divorce from her husband by filing a libel in the Pennsylvania Court on January 18, 1946 (R 8). She actively participated in the action in that Court when on May 5, 1947, she filed her petition for leave to discontinue her action, which leave was not granted (R 8-9). She was given ample notice and opportunity to be heard in the Pennsylvania action (R 13).

The petitioner had constantly raised the question of the residence of respondent in the case before the Circuit Court for Dade County, Florida, and also upon appeal to the Su-

preme Court of Florida[1], (See Note). The question as to whether the respondent was in fact a resident of Pennsylvania or a resident of Florida at the time she filed her action in Flordia and for 90 days prior thereto was not discussed by the Supreme Court of Florida in its opinion which was filed on May 2, 1952 (R 770).

Under the rules of practice in the Supreme Court of Florida, petitioner, within fifteen days after the filing of said opinion, petitioned the Supreme Court of Florida for rehearing, raising the questions now presented upon this petition, and specifically raising the question of residence of respondent (R 799, 800), and the fact that the conduct of the husband insofar as it would justify his wife in leaving him had been finally adjudicated by the final decree of the Pennsylvania Court (R 798).

The Supreme Court of Florida denied the petition for rehearing on the 21st day of May, 1952. (R 803).

NOTE 1:

That question was raised as follows:

In petitioner's objections to respondent's motion for leave to file amended Bill of Complaint (R 41).

In petitioner's motion to strike parts of respondent's response (R 43-46).

In petitioner's motion to strike parts of Amended Bill of Complaint (R 70).

In petitioner's motion to dismiss Amended Bill of Complaint (R 82).

In petitioner's answer to Amended Bill of Complaint (R 89).

In petitioner's contention before the Special Master (R 486).

In the 11th Exception to the Report of the Special Master (R 506).

In the 8th Assignment of Error (R 549).

JURISDICTION

1. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, which provides, in part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: • • • • •

"(3) By writ of certiorari, •••• where any title, right, privilege or immunity is specially set up or claimed under the Constitution, • • • •"

2. It is contended that the Supreme Court of the State of Florida did not give to the final judgment of a Pennsylvania Court of record, the full faith and credit to which the judgment of the Pennsylvania Court was entitled under the full faith and credit clause of the Federal Constitution, and therefore it is believed that the following cases sustain the jurisdiction of this Court:

Titus v. Wallick, 306 U. S. 282, 83 L. Ed. 653.

Supreme Council of Royal Arcanum v. Green, 237 U. S. 531, 59 L. Ed. 1089.

Sutton v. Leib, 342 U. S. 402, 72 S. Ct. 398, and cases therein cited including those cited in the notes stated in the report of that case.

3. The Supreme Court of Florida is the highest court of the State.

4. The judgment of which review is sought is a final judgment of the Supreme Court of Florida (R 789).

5. The judgment herein sought to be reviewed was filed on May 2, 1952 (R 788).

The Supreme Court of Florida denied a petition for rehearing in said case on the 21st day of May, 1952 (R 803).

6. The federal question of substance which has been decided by the Supreme Court of Florida is that, while the final decision of the Pennsylvania Court is entitled to full faith and credit under the Constitution and laws of the United States, that Pennsylvania judgment entered in an action instituted in Pennsylvania by the respondent, before she instituted her action in the sister state of Florida, was not res adjudicata in the subsequent divorce action in Florida, even though the parties were identical and the wife had instituted the action in each court, and thereby, voluntarily appeared in the Pennsylvania Court, and also in the Florida Court.

The decision of the Supreme Court of Florida denies to the final judgment of the Pennsylvania Court the full faith and credit guaranteed by the Constitution of the United States. The Supreme Court of Florida recognizes the fact that full faith and credit must be accorded judgments of a court of a sister state. In the first appeal the Court enforced the correct rule as to the requirements of the full faith and credit clause of the Federal Constitution. Upon the second appeal, the Court enforced that rule, but in part only. Therefore, it did not give to the final judgment of the Pennsylvania Court the full faith and credit guaranteed by the Constitution of the United States.

The decision of the Supreme Court of Florida is in conflict with the decisions of this court relative to the full faith and credit clause of the Federal Constitution and particularly is it in conflict with the recent decision of this Court in the case of Sutton v. Leib, No. 143 October term, 1951, reported in 342 U. S. 402; 72 S. Ct. 98, wherein this court held that a state court must give the same force and effect to the decrees of a court of a sister state as is accorded those decrees by the court in the state where rendered.

It is contended that the decree of the Supreme Court of Florida is in conflict with the recent decisions of this Court with respect to the effect to be given a final judgment of a state court under the full faith and credit clause in actions for divorce.

7. This petition for certiorari is filed in accordance with the United States Code Title 28, Section 2101, which provides, inter alia, as follows:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. • • • • •

"The running of the time within which proceedings may be initiated here to bring up judgment or decrees for review is suspended by the seasonable filing of a petition for rehearing." Gypsy Oil Company v. Escol, 275 U. S. 498, 72 L. Ed. 393.

It begins to run from the date of denial of such petition.

The petition for rehearing was denied May 21, 1952 (R 803).

8. The Federal questions raised in this case were raised by the petitioner, who continued to raise those questions throughout the trial in the Florida case.

QUESTIONS PRESENTED

1. Where wife files applicaion for divorce in Pennsylvania Court on the ground of indignities to her person, and after full hearing, at which wife had ample opportunity to be heard but did not attend, Pennsylvania Court enters

a final decree holding that wife had failed to support her claim and therefore, her action was dismissed at her cost, is that final judgment of the Pennsylvania Court res adjudicata in a divorce action filed in Florida after the Pennsylvania action had been filed, when the facts as to the conduct of the husband are substantially the same as the wife would have been required to prove in Pennsylvania to sustain her action for divorce?

2. In such case, where the Pennsylvania Court found, after hearing and upon competent testimony, that the wife was a resident of Pennsylvania and was not domiciled in Florida when her Florida action was filed, is that finding of the Pennsylvania Court conclusive in the subsequent action for divorce in Florida, under the full faith and credit clause of the Constitution of the United States?

3. Where the character of testimony relied upon by a wife to justify her in leaving her husband under the laws of Florida is substantially the same as that required to establish her charge of indignities to her person in a Pennsylvania Court, may the Florida Court retry the issues as to the conduct of her husband, and grant the wife a divorce on the ground of constructive desertion in an action instituted in Florida, after the wife's prior divorce action in Pennsylvania on the charge of indignities to the person has been dismissed for lack of the proof required to maintain her action in Pennsylvania?

4. Is a final judgment of a Pennsylvania Court, denying a wife a divorce on the ground of indignities to the person, conclusive as to all questions of fact essential to and litigated in the Pennsylvania Court, so that the wife is barred from obtaining a divorce in a subsequent action in Florida upon the ground of constructive desertion, based upon the same conduct of the husband as was adjudicated in the Pennsylvania action?

5. Where wife applies for divorce upon the ground of indignities to the person in a Pennsylvania Court, and that Court dismisses her action for failure of proof, and there is no general rule as to the degree of proof required to sustain an action for divorce on the ground of indignities to the person under Pennsylvania law, may the Florida Court subsequently grant a divorce to the wife on the ground of constructive desertion, where the conduct of the husband relied upon as the cause for the wife leaving her husband, is the same conduct as was passed upon in the Pennsylvania case?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of Florida has decided important questions arising under the Constitution of the United States of America and involving full faith and credit. It is contended that is has decided those questions in a way probably untenable and in conflict with the applicable decisions of this Court in the cases decided by this Court with respect to the full faith and credit which must be accorded a final judgment of a State court by courts of sister states in cases involving the granting of a divorce.

The cases referred to are COOK V. COOK, 342 U. S. 126; 72 S. Ct. 157, and SUTTON V. LEIB, 342 U. S. 402; 72 S. Ct. 398, together with other cases therein referred to and particularly in the notations appearing in the report of the last mentioned case. Reference is made also to the report of the case of GORDON V. GORDON, 160 Fla. 838, 36 So. 2d 774, as reported in 4 A.L.R. 2d 102, with annotations in the same volume beginning at page 107.

There are many decisions of your Honorable Court holding that where a state court grants a decree of divorce which compiles with all the laws of the state court granting the decree, that decree in divorce must be given the same full faith and credit in divorce must be given the same full faith and credit in every other state as it is entitled to in the state in which it is granted. Diligent search has disclosed no reported case decided by your Honorable Court setting forth the rule which must apply to the Courts of all States where a final judgment of a state court is entered denying a divorce application. For the sake of uniformity throughout the United States, the writ of certiorari should be allowed in this case so that a definite rule may be announced by your Honorable Court with relation to the full faith and credit which must be accorded a final judgment of a state court denying a divorce.

This case involves questions of great public importance involving martial status ,and the full faith and credit clause, where judgments of two state courts are involved. These matters of family status, marriage and divorce are of the greatest importance. We believe that there is no prior decision of this Court stating specifically that where a state court has entered a final judgment denying a divorce in a case complying with all the laws of that state, that final judgment denying the divorce, is entitled to the same full faith and credit in every other state as it is entitled to in the state denying the divorce.

It is contended that the Florida Courts have decided a federal question of substance in a manner not in accord with applicable decisions of Your Honorable Court. The grounds upon which the writ of certiorari is sought are substantial, because there may be many cases involving the marital relationship of many persons, in which full faith and credit may be denied a final judgment of a state court, by courts of other states relying upon the judgment of the Supreme Court of Florida in this case. The question as to whether one state has, or has not, accorded to the final

judgment of the courts of a sister state the full faith and credit guaranteed by the Constitution, and laws of the United States, and the judical decisions of Your Honorable Court, is also substantial because it involves constitutional rights.

Your Honorable Court has held that full faith and credit must be given to divorce decrees rendered in contested cases by courts in sister states, even though doing so may conflict with local policy, because that is part of the price we pay for our constitutional guarantees.

The questions presented in this case are substantial because they seriously affect the parties and their constitutional rights. Under the final judgment of the Pennsylvania Court the marital status of the parties hereto was not changed. Under the decree of the Florida Courts, the parties are no longer man and wife. Under the final judgment of the Pennsylvania Court, the respondent was a resident of Pennsylvania from 1941 until May 27, 1947. Under the decree of the Florida Courts, the respondent was a resident of Florida for at least 90 days before September 30, 1946. Those inconsistent judgments detrimentally affect the constitutional rights of the parties to this case.

The federal purpose of the full faith and credit clause of our constitution makes Your Honorable Court, for both state and federal courts, the final authority when a question is raised as to what is the permissible limit of the full faith and credit clause, and therefore, petitioner's constitutional rights should not be denied him by a decree of a state court defining the permissible limits of that clause.

The denial to petitioner of his constitutional rights to avoid relitigation of matters finally determined by one state court constitutes a substantial reason to allow a writ of certiorari in this case. Your Honorable Court has held that where a state court has determined the question of residence between parties, any attempt of a sister state to

redetermine that question of residence is void, and full faith and credit should be accorded the state which first determined that question of residence.

We respectfully represent that the Supreme Court of Florida has failed to give to the final judgment of the Pennsylvania Court, denying a divorce to the wife, the full faith and credit which should be accorded to that Pennsylvania decree. Since there is no prior decision of this Court relative to the full faith and credit which must be given in all the states to a final decree of a state court denying a divorce, the petition for certiorari should be granted so that a uniform rule may be obtained with reference to such final judgments of state courts denying divorce applications, as distinguished from those where the state courts have granted divorces.

We believe that a decree of this Court in the instant case will remove the lack of uniformity relative to the full faith and credit which must be given the final judgments of state courts in divorce actions. That there is a lack of uniformity with respect to the questions presented in the instant case is clearly shown by the opinion of the Supreme Court of Florida, from which we quote as follows (R 773): "Apparently some lawyers and text book authors believe there is confusion in the law of this jurisdiction upon the question, under what circumstances does the doctrine of res adjudicata or the principal of estoppel by judgment become operative. In all probability the confusion which apparently exists stems from a failure clearly to comprehend the difference between the doctrine of res adjudicata and estoppel by judgment and to understand the (R 774) test proper to be applied in determining which, or whether either, may be appropriately invoked. Estoppel by judgment has its counterparts or at least its quasi counterparts, in "estoppel by verdict" and "conclusiveness of verdict." Either res adjudicata or estoppel by judgment furnishes the primary test in determining the applicability of the full

faith and credit clause of the Federal Constitution. This Court has at least indicated that full faith and credit need not be given to a final decree of a sister state when estoppel by judgment is the appropriate test unless the "precise facts" offered by the plaintiff in the Florida action were heard and determined in the former suit which was adjudicated in the foreign jurisdiction. See Bagwell v. Bagwell, 153 Fla. 471, 14 So. 2d 841.

The adjudications in other jurisdictions which we have considered in connection with this case lead us to the conclusion that there is an absence of uniformity with respect to the test which should be employed to determine whether a final decree or judgment of a foreign jurisdiction should be accorded full faith and credit in a subsequent action be between the same parties.* Some courts hold, so we believe, as we held in Gordon v. Gordon, supra, that is to say that the determining factor in deciding whether the cause of action asserted in the first suit was the same as that relied upon in the second suit, is whether the evidence necessary to sustain the latter action was essentially the same as that which was given or would have been required had the complaining party testified in the prior suit. Buder v. Fiske, 174 F. 2d 260; Griggs v. Griggs, 214 S. C. 177, 51 S. E. 2d 622; Whelan v Connolly, 80 N. Y. S. 2d 691; Band v. Reinke, 230 Iowa 515, 298 N. W. 865; Jackson v. Pepper Gasoline Co., 284 Ky. 175, 144 S. W. 2d 212. See also 4 A.L.R. 2d 107 et seq. Other courts are of the opinion that full faith and credit should be given and that a final decree of a court of competent jurisdiction of a sister state should operate as a bar to a subsequent action as to all matters which were or (R 775) might have been litigated orginally. Ashton v. Ashton, 192 Ark. 774, 94 S. W. 2d 1033; Bowen v. Bowen, 219 Iowa 550, 258 N. W. 882; Ball v. Ball, 189 Ark. 975, 76 S. W. 2d 71; 27 C.J.S., Divorce, Sec. 326, page 1271; 4 A.L.R. 2d 114.

* Blackface supplied.

We have held as a general proposition that when a final decree or judgment of a court of competent jurisdiction becomes absolute it puts at rest and entombs in eternal quiescence every justiciable, as well as every actually adjudicated, issue. This pronouncement is considered by us as controlling only when res adjudicata is the proper test. By this we mean it is not controlling except in an instance wherein the second suit is between the same parties and is predicated upon the same cause of action as was the first. If the second suit is bottomed upon a different cause of action than that alleged in the prior case estoppel by judgment comes into play and only those matters actually litigated and determined in the initial action are forclosed—not other matters which "might have been but were not litigated or decided." Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L.R.A. (N.S.) 577; Bagwell v. Bagwell, supra. The test proper to be applied in a divorce action in order to decide whether the second suit is founded upon a new and separate cause of action is not simple whether a different statutory ground for divorce is asserted but whether the facts necessary to the maintenance of such suit are essentially the same as those which were relied upon to establish plaintiff's alleged right to a decree in the first action and whether the decree or judgment sought in each required the same degree of proof to justify or sustain it. If the degree of proof required in the first suit is greater than that required in the second the cause of action cannot be held to be the same and estoppel by judgment is the proper test to be applied.

(R 776) A great many courts and text book writers treat "res adjudicata" and "estoppel by judgment" as synonymous. The most erudite legal minds appear to have difficulty in stating the difference which they consider exists between them. We find no occasion to discuss the slight difference which some authors limn between the terms "estoppel by judgment", "estoppel by verdict" or "conclusiveness of verdict". These expressions are oft times used interchangeably. Although dissertations have come to our attention in which the doctrine of res adjudicata is considered as a sub-division or branch of the law of estop-

pel, strictly and technically speaking, such treatment is not proper. The former is founded upon the sound proposition that there should be an end to litigation and that in the interest of the State every justiciable controversy should be settled in one action in order that the courts and the parties will not be pothered for the same cause by interminable litigation. On the other hand, estoppel rests upon equitable principles. 50 C.J.S., Judgments, Sec. 593. Even so, the ultimate purpose of estoppel by judgment is to bring litigation to an end. The difference which we consider exists between res adjudicata and estoppel by judgment is that under res adjudicata a final decree or judgment bars a subsequent suit between the same parties based upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised, while the principle of estoppel by judgment is applicable where the two causes of action are different, in which case the judgment in the first suit only estops the parties from litigating in the second suit issues—that is to say points and questions—common to both causes of action and which were actually adjudicated in the prior litigation." (R 776).

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment and decree of the Supreme Court of Florida filed in this proceeding on May 2, 1952 should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

I.

OPINION OF THE COURT BELOW

This case was in the Supreme Court of Florida twice. The citation of the opinion of the Supreme Court of Florida on the first appeal is 160 Fla. 838, 36 So. 2d 774, ~~3d 102~~. The opinion appears in the record in this case, pages ~~7~~ 8 to ~~5~~ 13 inclusive.

The opinion of the Court sought to be reviewed was filed May 2, 1952, and is reported in 59 So. 2d, at page 40. The opinion appears in the record in this case, pages 770 to 787 inclusive.

II.

STATEMENT OF FACTS

We respectfully submit that the facts to be considered in this case are set forth fully in the petition under the heading of "Summary Statement of the Facts". (Petition, page 1 et. seq.)

III.

ASSIGNMENTS OF ERROR

1. The Supreme Court of Florida erred in failing to give full faith and credit to the final decree of the Pennsylvania Court by which the Pennsylvania Court had found that respondent was a resident of Pennsylvania and that she was not domiciled in Florida when her Florida action was filed.

2. The Supreme Court of Florida erred in failing to give full faith and credit to the final decree of the Pennsylvania Court by granting respondent a divorce on the ground of constructive desertion when the character of the testimony relied upon to justify respondent in leaving her husband was essentially the same as she would have been required to present in the Pennsylvania Court to establish her charge of indignities to the person.

3. The Supreme Court of Florida erred in failing to hold that the final judgment of the Pennsylvania Court, by which a divorce was denied, was res judicata in the action for divorce between the same parties in the Florida Courts.

4. The Florida Court erred in holding that the degree of proof required under the laws of the State of Florida to justify a wife in temporary leaving her husband was less than the degree of proof required to sustain a divorce on the ground of indignities to the person under the Pennsylvania law because there is no general rule in Pennsylvania as to the degree of proof required in such case.

5. The Supreme Court of Florida erred in failing to hold that the final judgment of the Pennsylvania Court, being entitled to full faith and credit, was conclusive as to all questions of fact essential to and litigated in the Pennsylvania action, and in failing to hold that the final judgment of that Court conclusively established the fact that petitioner's conduct was not such as to justify respondent in leaving him, but that respondent had, in fact, deserted petitioner.

6. The Florida Court erred in failing to give to the final judgment of the Pennsylvania Court the full faith and credit to which it was entitled in Pennsylvania, as required by the Constitution and laws of the United States and the judical decisions of Your Honorable Court.

IV.

PROPOSITIONS OF LAW

Petitioner contends that all factual issues as to domicile and residence of the respondent and the petitioner, and all other matters bearing upon jurisdiction, must be considered as forclosed by the final decree of the Pennsylvania Court since both parties to the divorce appeared in that Court and thereby became subject to its final decree. In support of this proposition, we cite: WILLIAMS V. NORTH CAROLINA, 325, U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577; SHERRER V. SHERRER, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429; COOK V. COOK, 342, U. S. 126, 72 S. Ct. 157 SUTTON V. LEIB, 342 U. S. 402, 72 S. Ct. 398.

Petitioner respectfully submits that under the decisions of Your Honorable Court, the full faith and credit clause of the Federal Constitution demands that the courts of each state give to a final decree of another state full faith and credit by barring either party to a divorce acion, who has been personally served, or who has entered a personal appearance, from collaterally attacking the decree of the court, in a state other than that in which it was entered. We believe that this proposition is sustained by the decisions of Your Honorable Court above mentioned, and also in the SECOND WILLIAMS CASE, 325 U. S. 226, S. Ct. 1092, at 1095, 89 L. Ed. 1577, and in the case of JOHNSON V. MULLBERGER, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411.

The propositions relied upon by the petitioner are:

1. A final decree of divorce, granted by a state court, where the parties have appeared, is entitled to full faith and credit in every state of the Union. Likewise, we contend that a final decree of a state court, denying a wife a divorce, is entitled to full faith and credit in every state of the

Union, and is conclusive upon all parties who appeared, as to the questions of domicile, good faith and conduct litigated in the action wherein the divorce was refused. In this case, the wife herself selected the Pennsylvania Court for the trial of the Pennsylvania action and therefore she was bound by the final decree of that Court.

2. There is no general rule as to the degree of proof required to sustain a divorce in Pennsylvania upon the ground of indignities to the person. Therefore the Supreme Court of Florida could not legally assume that there was a general rule in Pennsylvania, setting forth the degree of proof required in that state, and thus compare that rule with a rule in Florida justifying a wife in leaving her husband. The decision of the Supreme Court of Florida is based upon the assumption that the Florida courts demand less proof of mis-conduct to justify a wife in leaving her husband than do the Pennsylvania Courts to justify a wife in obtaining a divorce on the ground of indignities to the person. Since there is no rule in Pennsylvania by which the degree of proof could be measured, the reason given by the Supreme Court of Florida for its decree is not sound and, therefore, the proceeding in the Supreme Court of Florida should be reviewed by your Honorable Court and its final decree reversed.

3. To permit the decree of the Supreme Court of Florida to stand, results in a situation which should not be permitted. Under the final decree of the Pennsylvania Court, the marital status of these parties was not changed. The wife failed to sustain the burden of proving that her husband's conduct entitled her to a divorce on the grounds of indignities to her person. In that Court the proof was that the conduct of the husband could not have caused the wife to leave the husband, but on the contrary, it was shown that the wife deserted the husband. Under the final decree in the Florida case the same conduct was held to justify the wife in leaving her husband, and it was held

the wife had not deserted her husband, but on the contrary, the husband was guilty of constructive desertion of his wife.

4. Under the final judgment of the Pennsylvania Court it was determined that the wife, who was the plaintiff in the action, was a resident of, and domiciled in Pennsylvania from 1941 until 1947, and that she was not domiciled in Florida during any of that time. If that decision is given full faith and credit, then the wife could not possibly have been a resident of Florida for 90 days before she filed her action in the Florida Court on September 30, 1946.

V.

CONCLUSION

We respectfully submit that this case presents substantial and serious legal questions involving the final decrees of two states of the United States, which decrees are inconsistent. We contend further that the decree of the Supreme Court of Florida has denied to the final judgment of the Pennsylvania Court the full faith and credit demanded by the Constitution of the United States.

We believe that the propositions stated are supported by many decisions of your Honorable Court, many of which are set forth in the opinion, and in the notes of the report of the opinion, of your Honorable Court in the case of SUTTON V. LEIB, 342 U. S. 402, 72 S. Ct. 398. Also in those decisions set forth in the Annotations of the instant case as it first appeared in the Supreme Court of Florida, as set forth in 4 A.L.R. 2d at page 102 and 107 et seq.

Wherefore, we respectfully pray your Honorable Court to grant a writ of certiorari so that the judgment of the Supreme Court of Florida may be reviewed.

Respectfully submitted,

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Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1952

No. 283

MORRIS GORDON,
Petitioner,

vs.

MIRIAM GORDON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MIRIAM GORDON, respondent, submits this, her brief, by her undersigned counsel.

INTRODUCTORY STATEMENT

The respondent, MIRIAM GORDON, was plaintiff in the cause lately pending in the Circuit Court of the Eleventh Judicial Circuit of Florida, in Dade County sitting and was appellee in the appeal from the final decree which reversed that final decree and returned the cause to rules, (*Gordon v. Gordon,* 160 Fla. 838, 36 So. 2d. 774, 4 ALR 2nd 102). Thereafter the cause proceeded to another final decree and respondent was again appellee in the case of Gordon v. Gordon lately pending

in the Supreme Court of the State of Florida which resulted in an opinion and mandate affirming the said final decree, which opinion is reported in 59 So. 2d, 40. That opinion was filed on May 2, 1952, and the petitioner, who was appellant below, now seeks a Writ of Certiorari to review the said opinion and decree of the Supreme Court of Florida. Petitioner's "Summary Statement of Facts" is so argumentive that respondent believes it fails to clearly present the facts upon which the opinion and judgment below was based and, therefore, for the assistance of the Court, respondent respectfully submits this brief.

SUMMARY STATEMENT OF FACTS

"Plaintiff was born December 21, 1919, in Johnstown, Pennsylvania, the daughter of a wealthy family and was, upon reaching maturity, given a partnership interest in her father's business. She had engaged in social welfare work but was not dependent upon any outside income. The defendant was the owner and operator of a filling station. The parties were married March 9, 1941, in Pittsburgh, Pennsylvania, and after a honeymoon at Miami Beach, returned to live at the parents' home in Johnstown, Pennsylvania.

"A baby boy, Allen Richard Gordon, was born on July 24, 1942. Plaintiff experienced considerable difficulty with the birth and required internal and external stitching. Her doctor told her that she should abstain from sexual relations for a period of from five to six months and she so informed the defendant. After about six weeks he insisted upon having sexual relations to which she objected because she feared it would affect her future well being, but he so persisted that she succumbed. Thereafter, repeated demands were made by the defendant and it so affected her health that she was required to be under constant care of a physician.

"On September 24, 1944, while the defendant was in the military service assigned to duty with the United States Navy in Pearl Harbor, and the plaintiff was mak-

ing her home with her parents in Johnstown, Pennsylvania, the child was accidentally drowned in a fish pond. The defendant obtained an emergency furlough and arrived at the plaintiff's parents' home on September (R 479) 30, 1944. The plaintiff met and embraced him but he did not show warm affection for her. On the contrary, he complained about his journey home and his shock at the incident and remarked that he was out fighting the war and that she had neglected the child.

"That night without tenderness or affection the defendant insisted on sexual relations with plaintiff and although she remonstrated with him because of her distraught physical and mental condition she again gave in to his persistence and as a result of this painful experience she was left in a jittery, upset and nervous condition.

"During the following two and half weeks that the parties were together in plaintiff's parents' home after the death of the child, the defendant demanded sexual relations with the plaintiff practically every night in a brutal manner, without any showing of affection or tenderness and would satisfy himself without consideration to the pain caused to the plaintiff and with a total lack of any emotion or affection exhibited by him. These occurrences were over her protests because of the resulting pain and nervousness.

"The defendant kept repeating to the plaintiff during this period that if she had been a good mother the child would not have drowned and that he didn't want any children until he was relieved of his military duties and could return home so that he could watch over the children himself. These remarks and accusations kept plaintiff in a highly upset emotional condition.

"After the visit with plaintiff's parents the parties visited the defendant's parents in New York City where he continued to make onerous demands for sexual relations that were consummated in a brutal manner. He repeated his accusations that plaintiff was a neglectful

mother in the presence of defendant's, (R 480), mother who chided her for not having been more careful.

"When the defendant's furlough expired he returned to camp in Virginia. The plaintiff was too weak to return to her parents' home until after she had received treatments from a physician in New York for two days. The defendant came to Johnstown, Pennsylvania, at Thanksgiving time for two days and she informed him that she couldn't continue to live with him because of his constant accusations of neglect toward the child, and his brutal methods of sexual relations which would require her to constantly be under the care of a physician. The defendant made no apology for his actions and conduct but again sought sexual relations with plaintiff which she refused. About a week after this visit plaintiff had a slight breakdown which she attributed to nervousness as the result of defendant's conduct towards her and about a week later she went to New York where she suffered a complete breakdown and was under a physician's care for approximately two weeks.

"On January 2, 1945, the parties met at the plaintiff's parents' home in Johnstown to talk over their marital situation. Plaintiff told the defendant that she could not continue to live with him and have him continuously castigate her about their deceased child and have him treat her brutally in their sexual relations; that she would live in constant fear under these circumstances and require physician's care continually. Defendant stated that he had a right to feel the way he did, and that he wanted the plaintiff to return to him all of the allotment money which had been sent by him to her as well as the bonds given to her by her parents. Since that date the parties have never lived together." (R 481).

On January 28, 1946, MIRIAM GOLDHABER GORDON, filed her libel in divorce against MORRIS GORDON, in the Court of Common Pleas, Cambria County, Pennsylvania.

"The petition of Miriam Goldhaber Gordon, the above named Libellant, respectfully represents:

"1. That the names of the parties to this proceeding are Miriam Goldhaber Gordon, Libellant, and Morris Gordon, Respondent.

"2. That the time of the marriage of the Libellant and Respondent was the 9th day of March, 1941, the said marriage having been performed by Rabbi Herman Hailperin.

"3. That the place where the said marriage was performed was Pittsburgh, Allegheny County, Pennsylvania.

"4. That the citizenship and domicile of the Libellant at the time of said marriage was Westmont Borough, Cambria County, Pennsylvania, and of the Respondent was the City of Johnstown, Cambria County, Pennsylvania.

"5. That after the said marriage the said Libellant and Respondent lived together as husband and wife in the Borough of Westmont, in the City of Johnstown and in the Borough of Southmont, all in Cambria County, Pennsylvania.

"6. That the Libellant has been a citizen and resident of the State of Pennsylvania for more than one whole year previous to the filing of this Libel in Divorce.

"7. That the present place of actual residence of the Libellant is 100 Marion Street, Westmont Borough, Cambria County, Pennsylvania.

"8. That the present place of actual residence of the Respondent is 3111 Crescent Street, Astoria, State of New York.

"9. The Libellant avers that in violation of the Respondent's marriage vows and the laws of the Commonwealth of Pennsylvania, the said Morris Gordon, Respondent herein named, did on or about the 23rd day of November, 1944, and many times previous to said date, offer such indignities to her person as to render her condition intolerable and her life burdensome.

"WHEREFORE, the Libellant, being a citizen of the Commonwealth of Pennsylvania, as aforesaid, and entitled to the protection and benefits of the laws of said Commonwealth, hereby prays that a subpoena may issue directed to the said Morris Gordon, Respondent, commanding him to appear before your Honorable Court on the First Monday of March, 1946 to answer this Libel and Complaint, and the Libellant further prays that a decree may be entered by your Honorable Court divorcing and separating the said Morris Gordon, Respondent, from the said Libellant's society, fellowship and company in all time to come, and Miriam Goldhaber Gordon, the said Libellant, from the marriage bond aforesaid, as if they had never been married, or as if Morris Gordon, the said Respondent, were naturally dead.

"And thus she will ever pray." (R 110-112).

On April 26, 1946, Morris Gordon entered his appearance in the cause, (R 117), and on May 27, 1946, Morris Gordon filed his answer in the cause, (R 119-122).

While the suit in Pennsylvania was pending and at issue on libel and answer, MIRIAM GORDON, on June 25, 1946, changed her place of residence, establishing her residence in Dade County, Florida and has continuously resided in said State and County ever since, (R 481). On September 30, 1946, (96 days later), MIRIAM GORDON filed her complaint in the Circuit Court of the Eleventh Judicial Circuit of Florida, in Dade County sitting, seeking a divorce from Morris Gordon charging him with extreme cruelty, habitual indulgence in violent and ungovernable temper and wilful, obstinate and continuous desertion for one year, (R 469). On December 2, 1946, defendant, Morris Gordon filed his answer denying that plaintiff was a bona fide resident of the State of Florida and denying all other material allegations of the complaint, (R 469). The case proceeded to trial which terminated on May 28, 1947, (R 469). During the process of the trial in Florida, MIRIAM GORDON, on May 5, 1947, filed, in the Pennsylvania cause, her petition for leave to discontinue it

alleging, among other things, "(6) That the libellant since the filing of said action, moved to Miami Beach, Florida, where she is now making her residence and is no longer a citizen of the Commonwealth of Pennsylvania." (R 123), and on May 13, 1947, the Pennsylvania Court decreed as follows:

> "And now 13 May, 1947, after argument on petition and answer and after due consideration, the libellant's petition to discontinue the above action is hereby denied." (R 126).

On May 14, 1947, the Pennsylvania Court appointed a Master to take testimony and suggest a decree in the case, (R 126). On May 27, 1947, the Pennsylvania cause came on for trial but MIRIAM GORDON, the libellant did not appear nor was she represented by counsel, (R 128). At the conclusion of the taking of the testimony proferred by Morris Gordon, his counsel advised the Master as follows:

> "For the reason that it appears in this case that there is a divorce action pending in Florida, we call to the Master's attention the fact that his Libel in Divorce was filed in Cambria County on the 28th day of January, 1946, and the Answer was filed on the 27th day of May, 1946. The action in the Florida Courts was instituted on the 30th day of September, 1946, many months after the Respondent had filed an Answer in this case.
>
> "The record in this case shows that Miriam Goldhaber Gordon, voluntarily selected the Court of Common Pleas of Cambria County, Pennsylvania, as the form in which she desired to have her charges against her husband litigated, and we are of the opinion that no action she could take in any other State would oust the jurisdiction of the Court of Common Pleas of Cambria County, which is a Court of competent jurisdiction in this type of case, and having concurrent jurisdiction with the Circuit Court of Dade County, we call to your attention the discussion of questions similar to the ones involved in this case and reported in Vol. 14, American Jurisprudence, Section 246.

"We contend that here a Court of competent jurisdiction has equal jurisdiction and subsequently another Court in a different State would likewise be a Court of competent jurisdiction; the jurisdiction is concurrent, but the Court which has first been petition has the right to proceed until its jurisdiction has been exhausted by final judgment, and in support of that position we cite a Florida case, it being the case of Wade, et al. vs. Colwer, 114 Southern Reports, at page 548, in which case the question of jurisdiction was between a State Court and a Federal Court, but I am of the opinion that the same rule should apply with reference to State Courts on account of the Law of which is usually adopted, and in which the proceedings in the Court subsequently equal jurisdiction is suspended until the jurisdiction of the Court first having jurisdiction has been exhausted." (R 207-208).

On June 16, 1947, the Master in the Pennsylvania Court filed his report, (R 226), reporting among other things:

"A change of residence by Libellant pendente lite does not deprive the Court of Common Pleas of Cambria County of Jurisdiction.

"A change of residence by the Libellant after the commencement of a suit and before the trial does not deprive the Court of jurisdiction. 27 CJS 638, Sec. 74. Where the statutory requirements of jurisdiction exist when the Libel is filed, the jurisdiction is not affected by the Libellant's subsequent removal to another state. Sturgeon on Divorce, Sec. 100 (Page 39, citing DelVecchio vs. DelVecchio 21 Dist. 565, Barratt, J.)

"Both the Pennsylvania Courts and Florida Courts can have jurisdiction.

"As previously stated, an action for divorce not being a local one, but being a transitory action, may be brought in any Court of Competent jurisdiction. 27 CJS, 654, Sec. 83. As has been shown, the Court of Common Pleas of Cambria County, Pennsylvania, is a Court of competent jurisdiction, having jurisdiction over the cause of divorce. By statute in Florida, the Circuit Courts as courts of equity have

jurisdiction of divorce actions, Meloche vs. Meloche, 133 Southern Reports, 339; 101 Florida 659, affirmed, 140 Southern Reports, 319; 101 Florida 569. Thus actually both Pennsylvania and Florida Courts can have jurisdiction of the divorce action." (R 215-216).

And on June 28, 1947, the Pennsylvania Court entered the following decree:

"Decree

"Now, June 28, 1947, the findings of fact, conclusions of law and the recommendation of the Master are adopted by the Court and the Libel is dismissed at costs of the Libellant.

By the Court,
McKenrick,
Judge." (R 223).

The trial of the Florida case having been terminated on May 28, 1947, by the filing of Master's Report and the defendant filed exceptions to that report on June 7, 1947, (R 469-470).

On July 14, 1947, defendant filed a motion for leave to amend his answer by alleging the final decree of the Pennsylvania Court as res adjudicata, (R 470), and on July 18, 1947, the Court granted leave to the defendant to amend his answer which was amended on July 21, 1947. On July 24, 1947, plaintiff filed a motion to strike defendant's amendment to his answer, and on July 31, 1947, the Court entered an order granting plaintiff's motion to strike defendant's amendment to his answer setting up the Pennsylvania decree as res judicata and on the same day the Court entered a final decree overruling defendant's exceptions and granting a divorce of a vinculo matrimonii upon the ground that the defendant was guilty of extreme cruelty of a mental nature. The defendant, Morris Gordon, appealed and on September 27, 1948, the Supreme Court of Florida, in the case *Gordon v. Gordon*, (160 Fla. 838, 36 So. 2d. 774), re-

versed that final decree and remanded the cause for further proceedings not inconsistent with the opinion, (R 471).

On January 17, 1949, by leave of the Court, MIRIAM GORDON, filed her amended bill of complaint praying for divorce on the grounds of (1) extreme cruelty, and (2) desertion, and on May 4, 1949, the defendant filed his answer to the amended bill denying that plaintiff was a bona fide resident of the State and denying all other material allegations and alleged the Pennsylvania decree as res adjudicata of the issues, (R 472-473). The case was referred to a Special Master for trial and the trial was had and witnesses and testimony produced on November 21 and 22, 1949, and thereafter on April 21, 1950, the Special Master filed his report, (R 468).

With respect to jurisdictional residence in Florida, the Special Master found:

> "While the exemplified copy of the Pennsylvania proceedings shows that plaintiff filed her suit in Pennsylvania on January 28, 1946, and was a resident of that State on that date, there has been established by corroborated evidence that she established her domicile and residence in this State on June 25, 1946, more than the required period of time before the filing of her bill of complaint. She has continuously resided in Florida since the filing of her bill of complaint, departing from this State only a few occasions for short visits, and from the record as a whole the Master is satisfied that it was and is the intention of the plaintiff to make this State her permanent domicile." (R 477).

With respect to the issue of cruelty and desertion, the Special Master found:

> "There seems to the Special Master to be convincing evidence that after the unfortunate demise of the infant child, the plaintiff quite naturally was emotionally prostrate with grief. The death of a small loved one creates a heavy cross to bear under any circumstances and the accidental drowning of

the child under the facts presented in this case was a misfortune and tragedy, burdensome beyond belief. Accusations by the husband of negligence and lack of care and attention, particularly when made soon after the incident, would visit upon the wife and mother immeasurable mental anguish. The Special Master finds that after weighing all of the evidence it preponderates in plaintiff's favor that this situation confronted her immediately after the death of the child and continued until the separation of the parties.

"Such cruel treatment is, however, not a sufficient ground in this case to dissolve the marriage since that issue has already been decided adversely to the plaintiff by the Pennsylvania Court (even though the plaintiff did not appear and present her evidence in that cause although she had the opportunity to do so.) The Special Master further finds, however, that while the plaintiff was distraught, suffering from frayed nerves and emotional instability, the defendant persisted in his demands for sexual relations over the plaintiff's protests and that they were carried on without any showing of affection or consideration but only to the end of satisfying his desires. Plaintiff remonstrated and told the defendant that under the circumstances, it would only result in a painful experience to her and further aggravate her nervous condition. While this may not have amounted to compulsion by actual physical force, it was a continuing harrowing experience, the escape from which could only be by a separation of the parties. It would seem that such behavior is sufficient to constitute extreme cruelty of a physical nature (*Walker vs. Walker,* 182 So. 274) but in any event, it does make out a case of constructive desertion, for the defendant by his own act brought the cohabitation to an end. It is of no moment which of the married parties leaves the marital home. * * *

"In the Master's opinion, under the facts and circumstances of this case, there is sufficient evidence of defendant's misconduct to have justified the plaintiff in refusing to further live with the defendant and therefore the separation brought about by the defendant's acts constituted constructive de-

sertion of the plaintiff by the defendant." (R 485-487).

The Master further found:

"1. The Court has jurisdiction of the parties and of this cause and of the subject matter hereof.

"2. The Master finds that the plaintiff has established by competent testimony sufficiently corroborated that she became a bona fide resident domiciled in the State of Florida on June 25, 1946, and has made her permanent place of abode in this state since that time.

"3. The Master finds that the evidence preponderates that while the plaintiff was nervous, sick, worried and emotionally unstable because of the accidental death of their child, the defendant accused the plaintiff of being responsible for the child's death by reason of her inattention and neglect, and at the same time compelled the defendant to have intercourse with him against her wishes. Such conduct can be no more adequately described than extreme cruelty of a physical nature.

"4. The Master finds that the separation of the parties on January 2, 1945, was caused by the misconduct of the defendant rendering a continuance of the marital relationship impossible and intolerable to the Plaintiff, affecting her health and general well being to such an extent that should cohabitation be resumed, she would be required to be under the care of a physician constantly thereafter." (R 487-488).

The Pennsylvania law, *Purdon's Pennsylvania Statutes,* Title 23, Section 10, had been introduced in evidence during the trial. The pertinent portions of this Statute are as follows:

"(d) Shall have committed wilful and malicious desertion, and absence from the habitation of the injured and innocent spouse, without a reasonable cause, for and during the term and space of two years; or

"(e) Shall have, by cruel and barbarous treatment, endangeerd the life of the injured and innocent spouse; or

"(f) Shall have offered such indignities to the person of the injured and innocent spouse, as to render his or her condition intolerable and life burdensome;" (R 428).

On May 1, 1950, defendant filed exceptions to the Special Master's Report and on June 8, 1950, the Court entered its final decree, the pertinent portions of which are as follows:

"1. That this Court has jurisdiction of this cause, the parties hereto and the subject matter hereof.

"2. That plaintiff is a bona fide resident of the State of Florida and has been a bona fide, continuous, permanent resident of the State of Florida for a period beginning more than ninety (90) days immediately prior to the commencement of this cause.

"3. That the Report of the Special Master, DAVID W. DYER, hereinbefore filed, be and the same is hereby approved and his findings of fact adopted; the defendant's several exceptions to the Report of the said Special Master are each hereby severally denied.

"4. That the defendant is guilty of (a) Extreme Cruelty by Defendant to Complainant (such cruelty being of a physical nature), and (b) Wilful, Obstinate and Continued Desertion of Complainant by Defendant for one year. The equities of this cause are with the plaintiff and against the defendant, and plaintiff's prayer for divorce a vinculo matrimonii is hereby granted.

"5. That the plaintiff, MIRIAM GORDON, and the defendant, MORRIS GORDON, be and they are hereby divorced, each from the other, a vinculo matrimonii." (R 508-509).

On August 15, 1950, the defendant appealed, (R 537), and thereafter on May 2, 1952, the Supreme Court of Florida entered its opinion:

"That the final decree of divorce granted upon the ground of desertion should be and it is hereby affirmed." Re-hearing was denied May 21, 1952. (59 So. 2d. 40).

PETITIONER'S ASSIGNMENTS OF ERROR

Respondent suggests that an analysis of Petitioner's Assignments of Error shows that by these assignments the Petitioner is attempting to raise two issues as follows:

(a) That the Florida Statutes require,

"In order to obtain a divorce the complainant must have resided ninety (90) days in the State of Florida before the filing of the Bill of Complaint."

Section 65.02 Florida Statutes Annotated,

and the Pennsylvania Court on the trial, at which she was not present and offered no testimony, found that MIRIAM GORDON was a resident of Pennsylvania and had been such a resident from the date of her birth to the date of the trial; therefore, petitioner contends this finding is res judicata on the question of domicile and that the respondent, complainant in the Florida Court, was not domiciled in Florida at all, much less than for ninety (90) days, when her Florida action for divorce was filed.

(b) Petitioner contends that the Pennsylvania Court, after the trial, at which MIRIAM GORDON was not present and offered no testimony, found that no facts existed which would support her charge that Morris Gordon was guilty of "indignities to her person"; therefore, petitioner contends all facts existing prior to the commencement of the Pennsylvania action were res judicata and no testimony as to Morris Gordon's conduct prior to the commencement of the Pennsylvania libel was available or could be heard by the Florida Court in support of complainant's action in Florida for divorce on the ground of desertion.

Petitioner's Assignments of Error Nos. 1 and 6, seem to fall under his contention (a) above, and his Assignments of Error Nos. 2, 3, 4, 5 and 6, seem to fall under his contention (b) above.

RESPONDENT'S PROPOSITIONS OF LAW

Respondent contends that the Pennsylvania Statutes require, as a jurisdictional prerequisite, that libellant must have resided within that state for at least one year prior to filing the libel,

> See: PURDON'S, Pennsylvania Statutes Annotated, Title 23, Paragraph 6; Acts of 1929, P.L. 1237, Paragraph 16.

Respondent further contends that the Pennsylvania Statute requires that in order for an injured and innocent spouse to be able to obtain a divorce on the ground of desertion, that desertion must have continued for and during the term and space of two years,

> See: PURDON'S Pennsylvania Statutes, Title 23, Section 10, Acts of 1943, Public Law 21, Act No. 10.

The propositions affirmatively submitted by respondent in opposition to the petition for Writ of Certiorari are:

1. A final decree of dismissal granted by a state court of competent jurisdiction, where the parties have appeared, is not entitled to full faith and credit in a subsequent action in another state with respect to a question not within the issues as they were made or tendered by the pleadings and cannot operate as res judicata and be conclusive evidence of a fact sought to be established by it, if the fact was not a material one in the former action and not necessary to uphold the former judgment, that is, not responsive to the issue presented.

2. A final decree of dismissal, granted by a state court, where the parties have appeared, is not entitled

to be held res judicata in an action in another state between the same parties upon a different cause of action which had not ripened or matured under the statutes of that state, or was not available under the statutes of that state at the time of the insitution of the action which resulted in the judgment of dismissal.

SYNOPSIS OF ARGUMENT

Respondent contends that the doctrines laid down by this court in the cases of *Williams v. North Carolina,* 325 U.S. 226, and *Johnson v. Mullberger,* 340 U.S. 581, are not applicable to the cause now before you.

The *Williams v. North Carolina* case, supra, laid down the proposition that where a state court found that jurisdictional residence existed and granted a divorce, this finding in the final decree did not prevent the courts of another state from inquiring into the question of whether or not fraud had been practiced on the court, by the plaintiff, in producing the testimony leading to the entry of such final judgment.

On the other hand in the *Johnson v. Mullberger* case, supra, this court changed the former doctrine somewhat and held that where a judgment was entered in a state court in which both plaintiff and defendant had appeared and in such judgment the state court found and held that jurisdictional residence existed, then such judgment was thereafter forever res judicata on the question of jurisdictional residence and no court of another state could inquire into the matter.

Neither phase of the problem, considered above, is involved in petitioner's application for certiorari. The Florida Supreme Court recognized that the Pennsylvania Court had jurisdiction by reason of MIRIAM GORDON'S jurisdictional residence in Pennsylvania prior to the commencement of her action there, but the Florida Court held that when the Pennsylvania Court attempted to adjudicate with respect to questions not in issue before it, that is the question of whether or not

MIRIAM GORDON had changed her domicile subsequent to filing the Pennsylvania suit, such attempt by the Pennsylvania Court was not entitled to be recognized as res judicata on that question because it was not responsive to the issues and not necessary for the determination of the cause in Pennsylvania.

In support of this position we cite:

Reynolds v. Stockton, 140 U.S. 254;

30 Am. Jur. 927-28, Paragraph 182—"Matters not subject to Adjudication in Previous Action."

"Effect on jurisdiction of Court to grant divorce pendente lite."

7 A.L.R. 2d Annotation, Page 1414."

The above argument is presented in extended form under "Argument on First Proposition."

Respondent also submits that each statutory ground for divorce constitutes a separate cause of action and that desertion for the statutory period is not the same cause of action as that presented in the Pennsylvania libel wherein plaintiff charged that Morris Gordon was guilty of indignities to her person. Pennsylvania recognizes that desertion is a different ground from the one charged and requires that the desertion exist for two years before the libellant is entitled to a decree of divorce. Florida, on the other hand, holds that desertion need exist for one year in order to entitle plaintiff to a divorce, see, *Purdon's Pennsylvania Statutes, Title* 23, *Section* 10, (*d*), (*f*), and *Section* 65.04 (4), (7), *Florida Statutes Annotated.* The action in Florida being upon a different claim or demand, the Pennsylvania judgment is not res judicata, see, *Cromwell v. Sac Co.*, 94 *U.S.* 351. It should be further noticed that the mistreatment complained of by the wife need not be, of itself, sufficient to constitute grounds for divorce in order to justify her in separating from her husband and, therefore, the Pennsylvania judgment dismissing the libellant's charge that the defendant was guilty of in-

dignities to her person is not res judicata of the proposition that even though his conduct would not justify a divorce upon that ground, his conduct might be sufficient to justify a court in finding and holding that she was entitled to leave him and if the separation continued for the statutory period she would be entitled to a divorce on the ground of desertion. In support of the foregoing argument we have cited:

17 Am. Jur. 201 Paragraph 101;
Johnson v. Johnson, 125 Ill. 510;
Cochrane v. Cochrane, (Mass) 22 N.E. 2d 6;
Spafford v Spafford, (Ala). 74 So. 354;
Prall v. Prall, 58 Fla. 496, 50 So. 867;
Gordon v. Gordon, 160 Fla. 838, 36 So. 2d. 774;
Gordon v. Gordon, (Fla.) 59 So. 2d. 40;

Extended argument on this proposition is submitted under "Argument on Second Proposition."

ARGUMENT ON FIRST PROPOSITION

There were only two issues raised by the pleadings (libel and answer) in the Pennsylvania suit, i.e., (1) was the libellant, MIRIAM GORDON, a "citizen and resident of the State of Pennsylvania for more than one whole year previous to the filing," of the libel for divorce, (R 110), and (2) was the defendant, Morris Gordon, guilty of offering such indignities to libellant's person as to render her condition intolerable and her life burdensome (R 111).

As to issue (1), the petitioner contends, by his assignments of error Nos. 1 and 6, that the findings of the Special Master, to-wit:

> "3. *Citizenship.* The libellant has been a resident and citizen of the State of Pennsylvania all her life; and the respondent has also been a resident and citizen of Pennsylvania, since 1938, until he removed to Baltimore, Maryland," (R 211),

and,

> "Further Paragraph 7 of the libel in divorce states that the present residence of the libellant is

> 100 Marion Street, Westmont Borough, Cambria County, Pennsylvania, which was undisputed at the hearing inasmuch as libellant did not appear nor was she represented by counsel * * * *, On the basis of these facts, it is felt that the libellant is domiciled in Westmont Borough, Cambria County, Pennsylvania, and thus is not presently domiciled in the State of Florida",

adopted by the Court in its decree, (R 223), renders that decree res judicata of the domicile of MIRIAM GORDON during the entire period of the Pennsylvania litigation

While it is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action and were there jurisdictionally determined or conclusively settled by a judgment therein become res judicata, nevertheless, it is equally fundamental that such a judgment is not conclusive with regard to a question which, from the nature of the case and the issues presented, was not responsive to the issue.

> "We are of opinion that the decision of the Chancery Court of New Jersey, as sustained by the Court of Errors and Appeals of that State, is correct, and must be affirmed. *The first and obvious reason is that the judgment of the supreme court of New York was not responsive to the issues presented.* The section of the Federal Constitution which is invoked by plaintiffs is section 1 of article IV., which provides that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.' Under that section the full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other State in and of themselves require. It does not demand* * * * * * that a judgment rendered by a court which has jurisdiction of the person, but *which is in no way responsive to the issues tendered by the pleadings and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other State.*"

REYNOLDS v. STOCKTON, 140 US 254, 35 Law Ed., 464. (Italics supplied).

"* * *On the ground that a judgment rendered by a court on matters outside the issues submitted for its determination stands upon the same footing as one dealing with a subject matter entirely foreign to its jurisdiction, it has been held that the doctrine of res judicata operates only as to questions within the issues as they were made or tendered by the pleadings, and does not extend to matters which might have been litigated under issues formed by additional pleadings. Frequently, it is also declared that in order that a judgment may operate as res judicata and be conclusive evidence of a fact sought to be established by it, it must appear that the fact was a material one in the former action, that the determination of facts which were not necessary to uphold the former judgment does not conclude the parties, * * *"

30 Am. Jur., 927, Par. 182.

The Pennsylvania Statute requires, as a jurisdictional prerequisite, that the libellant for divorce must have resided within the State for at least one year prior to filing the libel:

Purdon's Pennsylvania Statute Annotated, Title 23, Paragraph 16; Acts of 1929, Public Law 1237, Paragraph 16.

The only jurisdictional question then, was not whether the libellant continued to reside in Pennsylvania after filing the libel, but on the contrary, was whether or not she had been a resident of Pennsylvania for more than one year prior to filing the suit.

"ANNOTATION

"Effect or jurisdiction of court to grant divorce, of plaintiff's change of residence pendente lite.

"General Rule.

"It seems to be the uniform rule, in the absence of an express statutory provision to the con-

trary, that if the plaintiff in a suit for divorce satisfies residential requirements at the time of commencing proceedings, the court's jurisdiction will survive his change of domicil.

"This result may rest on either of two grounds: (1) The statutes prescribing qualifications of residence nearly always contain the phrase 'at the time of commencing suit' or equivalent language; and (2) the situation is one to which the familiar equitable principle, that once a court has obtained jurisdiction of a cause, it will not be surrendered until the equities of all parties have been dealt with, applies.

"Colorado.-McMillin v. McMillin (1945) 114 Colo 247, 158 P2d 44, 160 ALR 396 (dictum).

"Delaware.—Long v. State (1949) - Del -, 65 A2d 489, revg (Del Gen Sess) 59 A2d 545 (applying law of Arkansas? See statement of this case, infra, under heading 'Under Arkansas statute').

"Indiana.—Waltz v. Waltz (1862) 18 Ind 449.

"Oklahoma.—Jackson v. Jackson (1949) - Okla -, 205 P2d 297, 7 ALR 2d 1410.

"Pennsylvania.—Platt v. Platt (1943) 26 Erie Co LJ 154.

"Texas.—Van Dyck v. Van Dyck (1938, Tex Civ App) 121 SW2d 642 (compare with Michael v. Michael (1904) 34 Tex Civ App 630, 79 SW 74); Williams v. Williams (1941, Tex Civ App) 146 SW2d 1013.

"Washington.—Polk v. Polk (1930) 158 Wash 242, 290 P 861.

"Wyoming.—Duxstad v. Duxstad (1909) 17 Wyo 411, 100 P 112, 129 Am St Rep 1138."

7 ALR 2d, 1414.

Under the uniform general rule above stated, to which Pennsylvania adheres, the question of whether or not MIRIAM GORDON, changed her domicile pending suit for divorce was immaterial. The only material question with respect to jurisdiction which was raised

by the issues in the Pennsylvania suit was the question of whether MIRIAM GORDON was a resident at the time of filing the libel and had been such a resident for more than one year on that date. The finding by the Pennsylvania Court, after an ex-parte trial, that MIRIAM GORDON was then and always had been a resident of Pennsylvania and not a resident of Florida was immaterial, not responsive to the issues made by the pleadings, and since the controversy did not turn upon that finding of "alleged" fact, the judgment on this point does not conclude the parties in reference to that issue.

ARGUMENT ON SECOND PROPOSITION

Each separate statutory ground for divorce, by the weight of authority, constitutes a separate cause of action and this rule has long been recognized in Florida.

PRALL v. *PRALL*, 58 Fla. 496, 50 So. 867.

The libel in Pennsylvania alleged that Morris Gordon, the respondent, did, on or about the 23rd day of November, 1944, and many times previous to said date, offer such indignities to her person as to render her condition intolerable and her life burdensome, (R 111). This charge is the same as the Florida charge of extreme cruelty of a mental nature.

> "This Court has recognized two types of 'extreme cruelty'—one physical, the other mental. Apparently Pennsylvania, through its legislative body, has also given cognizance to this distinction by providing separate grounds for divorce, to-wit: 'indignities to the person' and 'cruel and barbarous treatment' which endangers the life of the injured and innocent spouse. The former ground appears from the adjudications of the Pennsylvania Courts to fall into our classification of mental cruelty and the latter into the category of physical cruelty."
>
> *GORDON* v. *GORDON*, 160 Fla. 838, 36 So. (2d) 774.

The original complaint filed in Florida on September 30, 1946, charged that the defendant, Morris Gordon, was guilty of extreme cruelty by defendant toward plaintiff, habitual indulgence in violent and ungovernable temper, and wilful, obstinate and continuous desertion of the plaintiff by the defendant for one year. So in reality, that complaint stated four causes of action,

(a) Cruelty of a physical nature,

(b) Cruelty of a mental nature,

(c) Violent and ungovernable temper,

(d) Desertion.

On the original trial the plaintiff elected to prove only cruelty of a mental nature and the final decree was reversed by the Florida Supreme Court in the case, Gordon vs. Gordon, supra. The amended bill of complaint charged that the defendant, Morris Gordon, was guilty of,

(a) Cruelty of a physical nature, and

(b) Desertion.

On final hearing, the Circuit Court, Dade County, Florida, held that the defendant was guilty of extreme cruelty of a physical nature and was also guilty of desertion. On the second appeal, the Supreme Court of Florida held that the evidence as to defendant's cruel conduct did not amount to physical cruelty but held that the defendant's conduct amounted to desertion and, therefore, affirmed the final decree of divorce (see Gordon vs. Gordon, 59 So. 2d, 40).

The gravamen of the case proved by MIRIAM GORDON against her husband, was that the mistreatment of her by him was such as to justify her in refusing to live with him and further, i.e., that he was guilty of constructive desertion.

Before proceeding further with the discussion, we suggest that this Court has recognized that a decree or

judgment in one case does not necessarily operate as res judicata of a second action between the same parties.

> "Where the second action, between the same parties, is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered."
>
> *CROMWELL v. SAC COUNTY,* 94 U.S. 351; 24 Law Ed. 195.

We believe that pronouncement was in recognition of the principle that the denial on the merits of a divorce for the ground alleged in the prior action is not necessarily a bar to a subsequent action by the same spouse for a divorce for another distinct and separate ground existing at the time of the first action, see, 17 Am. Jur. 404, *Prall v. Prall,* 58 Fla. 496, 50 So. 867, Morrison v. Morrison, 142 Mass. 361, 8 NE 59, Re Pietsch, 25 Pa. D. & C. 436.

In this case, since the last decree is upon an entirely different cause of action than the one pursued in Pennsylvania, the doctrine of res judicata does not apply. It is also true that the doctrine of estoppel is not applicable because although the Florida statute makes desertion for one year a ground for divorce, the Pennsylvania statute says:

> "(d) Shall have committed willful and malicious desertion, and absence from the habitation of the injured and innocent spouse, without a reasonable cause, for and during the term and space of two years;"
>
> (Purdon's Pennsylvania Statutes, Title 23, Section 10; Acts of 1943, P.L. 21 - Act No. 10).

According to the evidence the separation of the parties could not have occurred prior to November 23, 1944, though the evidence shows that the defendant husband packed his clothes and left the home usually occupied by the parties, in the last week of December,

1944, and that the parties have never occupied the same home at any time since and have never lived together at any time since. Whether the desertion is said to have commenced in November, 1944, or in December, 1944, or on January 2, 1945, the date of the last conference between the parties, the statutory period prescribed by Pennsylvania had not run when MIRIAM GORDON filed her libel for divorce against Morris Gordon, January 28, 1946. Under these circumstances neither estoppel nor res judicata apply.

> "Either spouse may by reason of misconduct or cruelty drive the other away, in which case the former, and not the latter, is the deserter or guilty of desertion. In other words, the conduct of one of the parties may justify separation from him or her by the other and confer the right upon the latter to obtain a divorce upon the ground of willful desertion."
>
> *17 Am. Jur.*, p. 201. par. 101.
>
> "To constitute Constructive Desertion, it is not necessary to show that the defending spouse misconducted himself or herself with the intent of forcing the other to leave the home; nor is it necessary that there should have existed in connection with the acts of cruelty any settled purpose to drive away the other. It is enough if such is a natural consequence of the acts.* * * In many jurisdictions, however, the rule adopted does not require the misconduct to be such as in itself would have been a ground for divorce."
>
> *17 Am. Jur.* p. 202, par. 101.
>
> "If the husband voluntarily does that which compels the wife to leave him, or justifies her in so doing, the inference may be justly drawn that he intended to produce that result, on the familiar principle that sane men usually mean to produce those results which naturally and legitimately flow from their actions, and if so intended, her leaving him would, in the case put, be desertion on his part and not by the wife."
>
> *JOHNSON v. JOHNSON*, 125 Ill. 510.

From the foregoing authorities it is apparent that even though the evidence produced by the plaintiff in Florida, (she produced none in Pennsylvania), has been judicially ascertained, through the doctrine of res judicata, to be insufficient to justify the entry of a decree of divorce upon the ground of indignities to her person or extreme cruelty of a mental nature, yet those facts were such as would justify her in ceasing to live with him even though they have been determined not to amount to grounds for divorce in and of themselves; therefore, since she was justified in ceasing to live with him, he is the deserter, for the Courts have said:

> "It is settled that ill-treatment or misconduct of the husband of such a degree or under such circumstances as not to amount to cruelty for which the wife would be entitled to sue for a divorce may yet justify her in leaving his house and preventing his obtaining a divorce on the ground of desertion if she does."
>
> *COCHRANE v. COCHRANE,* (Mass.), 22 N.E. 2d. 6.
>
> "In order to justify the withdrawal by one spouse from the home and society of the other, it is well settled in this State, *in accord with the weight of reason and authority,* that the provoking cause or causes need not be such as would entitled the injured spouse to a divorce."
>
> *SPAFFORD v. SPAFFORD,* (Ala.) 74 So. 354.

Florida Court Gave Full Faith and Credit to Every Justiciable Point and Question Decided By Pennsylvania Court

The Supreme Court of Florida, in the judgment which petitioner seeks to have reviewed, gave every consideration to the judgment of the Pennsylvania

Court. The pertinent portions of the opinion of the Supreme Court of Florida (59 So. 2d. 40) are here quoted:

> "It was our opinion and judgment upon the first appearance of the instant suit in this Court that the Pennsylvania Court's final decree should have been given full faith and credit because we determined that both suits were predicated upon the same cause of action after concluding that the testimony which was presented by the appellee in her Florida suit was 'essentially the same as that which she would have been required to present to establish her charge of 'indignities to the person', had she pursued her action in Pennsylvania where she was given ample notice and opportunity to be heard.'
>
> "Upon remand to the Circuit Court appellee amended her bill of complaint. In and by her amendment she reiterated her charge of extreme cruelty and elaborated thereon. She also reasserted that the appellant had been guilty of desertion which she contends was constructive in character." (at p. 42)
>
> "We will first deal with the question whether the Pennsylvania decree should have been given full faith and credit and whether it operates as a bar to the entry of the final decree now under review." (at p. 43)
>
> "We have held as a general proposition that when a final decree or judgment of a court of competent jurisdiction becomes absolute it puts at rest and entombs in eternal quiescence every justiciable, as well as every actually adjudicated, issue. This pronouncement is considered by us as controlling only when res adjudicata is the proper test. By this we mean it is not controlling except in an instance wherein the second suit is between the same parties and is predicated upon the same cause of action as was the first. If the second suit is bottomed upon a different cause of action than that alleged in the prior case estoppel by judgment comes into play and only those matters actually litigated and de-

termined in the initial action are foreclosed—not other matters which 'might have been, but were not, litigated or decided.' *Prall v. Prall,* 58 Fla. 496, 50 So. 867, 870, 26 L.R.A., N.S., 577; *Bagwell v. Bagwell,* supra. The test proper to be applied in a divorce action in order to decide whether the second suit is founded upon a new and separate cause of action is not simply whether a different statutory ground for divorce is asserted but whether the facts necessary to the maintenance of such suit are essentially the same as those which were relied upon to establish plaintiff's alleged right to a decree in the first action and whether the decree or judgment sought in each requires the same decree of proof to justify or sustain it. If the degree of proof required in the first suit is greater than that required in the second the cause of action cannot be held to be the same and estoppel by judgment is the proper test to be applied." (at pp. 43-44)

" 'It is the essence of estoppel by judgment that it be made certain that the precise facts were determined by the former judgment'." (at p. 44)

"We hold the view that the expression 'precise facts' has been, and should be, given the same signification as the word 'every point and question'." (at p. 45)

"The issue, point and question in Miriam Gordon's Pennsylvania action against her husband was whether she was entitled to a final decree of divorce upon the ground of 'indignities to the person' which we in *Gordon v. Gordon,* supra, likened unto extreme cruelty of a mental nature. The issues—the points and questions—in the instant suit are: (1) Was Miriam Gordon justified in temporarily separating from her husband; (2) If she was justified in such action, did Morris Gordon perform the duty cast upon him by the law of attempting a reconciliation in good faith; (3) Was he excused from performing such duty because under the facts and circumstances of the case an attempt at reconciliation would manifestly have been unavailing.

"It is clear that none of the issues presented in and by the present suit, insofar as it is predicated upon 'constructive' desertion is concerned, was adjudicated in the Pennsylvania action. Moreover, no one of the issues in this suit was a justiciable issue, that is to say one proper to have been adjudicated, in the Pennsylvania litigation." (at p. 47)

"It is true that the facts relied upon by Miriam Gordon in her Pennsylvania suit in which she sought an absolute divorce on the ground of 'indignities to the person' would have been essentially the same, had she appeared and testified, as the facts which she presented in this Florida action. However, the degree of proof necessary to entitle her to the relief which she sought in the former action—a final decree of divorce upon the ground of 'indignities to the person'—was greater than the degree of proof required to establish that she was justified in temporarily separating from her husband. Consequently, it would be illogical to say that the issues—the points and questions—which were heard and determined in Miriam Gordon's Pennsylvania suit were the same as those existing in the current Florida action or that the cause of action in both suits was identical. This being so, neither estoppel by judgment nor res adjudicata forms a basis for invocation of the full faith and credit clause of the Federal Constitution." (at p. 47)

"Since we have concluded that appellee was justified, because of the conduct of her husband toward her, in temporarily separating from him there is no question that appellant should have attempted a reconciliation and such attempt should have been made in good faith." (at p. 48)

"He has never, according to this record, evidenced a truly repentent attitude, nor has he actually sought his wife's forgiveness and expressed an earnest purpose to refrain in the future from his accusations concerning her asseverated carelessness in connection with the tragic death of their

son which caused their common heartache. Indeed, upon their final conference, about January 2, 1945, when appellee told appellant why she found it necessary to leave him and why she felt she could not return to him, he remained silent insofar as any attempt at reconciliation was concerned and immediately began to make demands with reference to a settlement of their property rights. He has taken the position in this litigation that there was nothing he had done for which he should seek forgiveness, nor was there anything he had done that he should promise to refrain from doing in the future." (at p. 48)

"Under these circumstances we are compelled to agree with the Chancellor's conclusion that no good faith attempt at reconciliation was ever made by appellant.

"We conclude that the Pennsylvania decree should not be held to operate as res adjudicata upon the final decree now under review for the cause of action was different in that suit, nor should it be held to work an estoppel by judgment as to the appellee's cause of action herein, to wit: (constructive) desertion because the issues—points and questions actually litigated and determined—were not the same in both actions. Therefore, such decree is not a bar to this suit for it is not entitled to full faith and credit. It is further our conclusion that the final decree of divorce granted upon the ground of desertion should be and it is hereby affirmed." (at p. 48)

GORDON v. GORDON, 59 So. 2d 40.

CONCLUSION

We respectfully submit that this case presents no substantial and serious legal questions involving the final decrees of two states of the United States and we contend that the decrees brought forward by petitioner are not inconsistent. We contend that the decree of the Supreme Court of the State of Florida, which petitioner

seeks to bring before this Court is not a denial of the full faith and credit demanded by the Constitution of the United States.

We respectfully submit that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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